

**875—218.207(91D) Discretion and independent judgment.**

**218.207(1)** In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term implies the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

**218.207(2)** The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following:

- a.* Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards, and
- b.* Misapplication of the term to employees making decisions relating to matters of little consequence.

**218.207(3)** and **218.207(4)** Reserved.

**218.207(5)** Final decisions not necessary. The term “discretion and independent judgment” does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee’s decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

**218.207(6)** Reserved.

**218.207(7)** Customarily and regularly. The phrase “customarily and regularly” signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of the employee’s duties. The requirement is not met by the occasional exercise of discretion and independent judgment.

SOURCE: 29 CFR 541.207.